Sinai Hospital of Baltimore, Inc. d/b/a VSP *and* 1199 SEIU United Healthcare Workers East. Case 05–CA–265997

May 25, 2021

DECISION AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND RING

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by 1199 SEIU United Healthcare Workers East (the Union) on September 11, 2020,[1] the General Counsel issued a complaint on September 25 and an amended complaint on December 2, alleging that since about September 8, Sinai Hospital of Baltimore, Inc. d/b/a VSP (the Respondent) has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 05–RC–244319. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer and amended answer to the complaint, and an answer to the amended complaint, admitting in part and denying in part the allegations and asserting affirmative defenses.

On December 22, the General Counsel filed a Motion for Summary Judgment. On December 28, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response to the Notice to Show Cause and opposition to the Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the unit is inappropriate because it includes employees in a "primarily rehabilitative" relationship with the Respondent.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

In its answers to the complaint and amended complaint, and in its response to the Notice to Show Cause and opposition to the Motion for Summary Judgment, the Respondent also argues that Section 10(b) of the Act barred the complaint because the September 11 charge was filed more than 6 months after the Respondent's initial refusal to bargain with the Union, as stated in a letter sent to the Union by certified mail on January 23 and received by the Union on January 24.[2] In the letter, the Respondent informed the Union that it would not bargain while its January 10 request for review of the Union's certification was pending. The Respondent does not dispute, however, that in a September 4 telephone call, the Union requested the Respondent to provide it with dates to engage in collective bargaining, and that by email on September 8 the Respondent again communicated its refusal to bargain. In opposing the General Counsel's motion for summary judgment, the Respondent contends that January 24, not September 8, is the operative date for purposes of Section 10(b). The Respondent also contends that the Union's September 4 request does not constitute an adequate demand for bargaining because it only asked for "dates to bargain" and was made to an attorney who represented the Respondent during the underlying representation proceeding but was not authorized to represent it in collective bargaining.

We find that the Respondent's arguments do not raise any material issues warranting the denial of summary judgment. Contrary to the Respondent's assertion, the

[1] All dates are in 2020 unless otherwise indicated.

[2] In its answers to the complaint and amended complaint, the Respondent raises several additional affirmative defenses—specifically, that the complaint fails to state a claim on which relief can be granted; the complaint fails to provide adequate notice to the Respondent of the charges against it; the charges, investigation, and complaint are procedurally defective; some or all of the allegations in the complaint fall outside the scope of the underlying charge; and the complaint is barred by the doctrine of laches. However, the Respondent has not offered any explanation or evidence to support these bare assertions. Thus, we find that these affirmative defenses are insufficient to warrant denial of the General Counsel's Motion for Summary Judgment in this proceeding. See, e.g., *GADecatur SNF LLC d/b/a East Lake Arbor*, 370 NLRB No. 34, slip op. at 1 fn. 1 (2020). In addition, the Board and the courts have long held that the defense of laches does not lie against the Board as an agency of the United States Government. See, e.g., *Entergy Mississippi, Inc.*, 361 NLRB 892, 893 fn. 5 (2014), affd. in relevant part 810 F.3d 287, 298–299 (5th Cir. 2015), citing *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969).

complaint is not barred by Section 10(b) due to the charge being filed more than 6 months after the Respondent's initial refusal to bargain on January 24. The Board has held that even where there was an initial request and refusal to bargain outside of the 10(b) period, a respondent's later refusal to bargain after a subsequent bargaining request made during the certification year constitutes an independent unfair labor practice for 10(b) purposes. Thus, in *Bentson Contracting Co*., 298 NLRB 199, 200 (1990), enf. denied on other grounds, but affd. in pert. part 941 F.2d 1262, 1264–1265 fn. 2 (D.C. Cir. 1991), the Board held that, as a matter of law, successive refusals to bargain during the certification year are separate unfair labor practices based on the obligation to bargain that was established both factually and legally by the Board's certification, and cannot be deemed "merely reiterations of an initial refusal to bargain."

Here, it is undisputed that the Union filed its September 11 charge only 3 days after the Respondent's latest refusal to bargain on September 8. Further, we find no merit in the Respondent's assertions that the Union's September 4 request for bargaining was inadequate. First, the Union's request for dates to bargain clearly conveyed a valid bargaining request. See, e.g., *Biewer Wisconsin Sawmill*, 306 NLRB 732, 732 fn. 4 (1992) (union letter requesting that employer telephone ''to set a date to begin negotiations" "clearly indicate[d] a desire to negotiate" and therefore constituted a valid request to bargain). In addition, the fact that the attorney responded to the request on the Respondent's behalf shows that, contrary to the Respondent's contention, he remained its agent at least for the purpose of communicating its refusal to bargain. See *Flair Molded Plastics, Inc.*, 250 NLRB 202, 203 (1980) (finding attorney was agent under similar circumstances), enf. denied 654 F.2d 727 (7th Cir. 1981) (unpublished table decision).[3] In these circumstances, we find that the September 11 charge was timely filed and not barred by Section 10(b) of the Act. See, e.g., *UPS Ground Freight, Inc.*, 366 NLRB No. 100, slip op. at 1–2 (2018), enfd. 921 F.3d 251 (D.C. Cir. 2019) (finding charge timely under similar circumstances).

Accordingly, we grant the Motion for Summary Judgment. On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, Sinai Hospital of Baltimore, Inc. d/b/a VSP, a corporation with an office and place of business in Baltimore, Maryland, has been engaged in the operation of an acute care hospital providing inpatient and outpatient medical care. In conducting its operations during the 12-month period ending August 31, 2020, the Respondent derived gross revenues in excess of $250,000, and purchased and received at its Baltimore, Maryland facility goods valued in excess of $5000 directly from points outside the State of Maryland.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and a health care institution within the meaning of Section 2(14) of the Act, and that the Union, 1199 SEIU United Healthcare Workers East, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on December 18, 2019, the Union was certified on December 30, 2019, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time janitors employed by the Employer at the Social Security Administration's Perimeter East Building located in Baltimore, Maryland or Woodlawn, Maryland; excluding all office clericals, confidential employees, professionals, managers, guards, and supervisors as defined in the Act.[4]

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

Since about September 4, the Union has requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about September 8, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that the Respondent's conduct constitutes an unlawful failure and refusal to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about September 8 to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

[3] In light of our finding that the Union made a timely request for bargaining on September 4, we find it unnecessary to pass on the complaint allegation that the Union also made a valid request for bargaining on August 21.

[4] As mentioned in the Acting Regional Director's November 29, 2019 Decision and Direction of Election, the parties have been unable to determine whether the Perimeter East Building is in Baltimore, Maryland or Woodlawn, Maryland.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Sinai Hospital of Baltimore, Inc. d/b/a VSP, Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with 1199 SEIU United Healthcare Workers East (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time janitors employed by the Employer at the Social Security Administration's Perimeter East Building located in Baltimore, Maryland or Woodlawn, Maryland; excluding all office clericals, confidential employees, professionals, managers, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Baltimore, Maryland or Woodlawn, Maryland, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 8, 2020.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 25, 2021

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

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John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with 1199 SEIU United Healthcare Workers East (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All full-time and regular part-time janitors employed by the Employer at the Social Security Administration's Perimeter East Building located in Baltimore, Maryland or Woodlawn, Maryland; excluding all office clericals, confidential employees, professionals, managers, guards, and supervisors as defined in the Act.

SINAI HOSPITAL OF BALTIMORE, INC. D/B/A VSP

The Board's decision can be found at www.nlrb.gov/case/05-CA-265997 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.